42 U.S. Code § 1983 Update

by: Elliot B. Spector
Connecticut Criminal Law Foundation, Inc.
http://www.cclfinc.org/

November, 2004
IACP Legal Officers Section

Contents

Investigative Detention

Flowers v. Fiore, 359 F.3d 24 (1st Cir. 2004).
Young v. Prince George's County, 355 F.3d 751 (4th Cir. 2004).
Kopec v. Tate, 361 F.3d 772 (3rd Cir. 2004).
King v. City of Eastpointe, 86 Fed.Appx. 790 (6th Cir. 2003).
Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).
Bolton v. Taylor, 267 F.3d 5 (1st Cir. 2004).

Excessive Force

Brown v. City of McComb Police, 84 Fed.Appx. 404 (5th Cir. 2003).
Wilkins v. City of Oakland, 350 F.3d 949 (9th Cir. 2003).
Cunningham v. Hamilton, 84 Fed.Appx. 357 (4th Cir. 2004).
Robinson v. Nolte, 77 Fed.Appx. 413 (9th Cir. 2003).
Cowan v. Breen, 352 F.3d 756 (2nd Cir. 2003).
Hernandez v. Jarman, 340 F.3d 617 (8th Cir. 2003).
Haugen v. Brosseau, 339 F.3d 857 (9th Cir. 2003).
Lucero v. City of Albuquerque, 77 Fed.Appx. 470 (10th Cir. 2003).
McCurdy v. Dodd, 352 F.3d 820 (3rd Cir. 2003).
Gaddis v. Redford Twp., 364 F.3d 763 (6th Cir. 2004).

False Arrest

Braun v. Baldwin, 346 F.3d 761 (7th Cir. 2003).
Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003).
Ochana v. Flores, 347 F.3d 266 (7th Cir. 2003).
Renda v. King, 347 F.3d 550 (3rd Cir. 2003).
Lawyer v. City of Council Bluffs, 361 F.3d 1099 (8th Cir. 2004).
Anderson v. Cass County, 367 F.3d 741 (8th Cir. 2004).
Karam v. City of Burbank, 352 F.3d 1188 (9th Cir. 2003).
Dorman v. Castro, 347 F.3d 409 (2nd Cir. 2003).
McCullah v. Gadert, 344 F.3d 655 (7th Cir. 2003).
Pena-Borrero v. Estremeda, 365 F.3d 7(1st Cir. 2004).
Lee v. Gregory, 363 F.3d 931 (9th Cir. 2004).
McCann v. Mangialardi, 227 F.3d 782 (7th Cir. 2003).

Chortek v. City of Milwaukee, 256 F.3d 740 (7th Cir. 2004).

Search and Seizure

Martin v. City of Oceanside, 360 F.3d 1078 (9th Cir. 2004).
Harajli v. Huron Twp., 365 F.3d 501 (6th Cir. 2004).
Ali Shamaeizadeh v. Cunigan, 383 F.3d 535 (6th Cir. 2003).
Hell's Angels v. McKinley, 360 F.3d 930 (9th Cir. 2004).
Storck v. City of Coral Springs, 354 F.3d 1307 (11th Cir. 2003).
Hadley v. Williams, 268 F.3d 747 (7th Cir. 2004).
Duarte v. Robards, 86 Fed.Appx. 270 (9th Cir. 2003).
Doe v. Groody, 361 F.3d 232 (3rd Cir. 2004).
Heft v. Moore, 351 F.3d 278 (7th Cir. 2003).
Hughes v. Lott, 350 F.3d 1157 (11th 2003).

Failure to Protect

Rivas vs. City of Passaic, 365 F.3d 181 (3d Cir. 2004).
Tremblay vs. McClellan, 350 F.3d 195 (1st Cir. 2003).
Estate of Allen v. City of Rockford, 349 F.3d 1015 (7th Cir. 2003).
Di Benedetto v. Pan Am World Service, 359 F.3d 627 (2d Cir. 2004).
Gatlin v. Green, 362 F.3d 1089 (8th Cir. 2004).
International Action Center v. U.S., 365 F.3d 20 (D.C. Cir. 2004).

Supervisory

Dunn v. City of Elgin, 347 F.3d 641 (7th Cir. 2003).
Graham v. Co. of Washtenaw, 358 F.3d 377 (6th Cir. 2004).
Isom v. Town of Warren, Rhode Island, 360 F.3d 7 (1st Cir. 2004).
Campbell v. Miller, 373 F.3d 834 (7th Cir. 2004).
Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004).
Larkin v. St. Louis Housing Auth., 355 F3d 1114 (8th Cir. 2004).
Kelso v. City of Toledo, 77 Fed.Appx. 826 (6th Cir. 2003).
Floren v. Whittington, 217 F.R.D. 389 (S.D. West Virginia 2003).

Investigative Detention

Flowers v. Fiore, 359 F.3d 24 (1st Cir. 2004)

Officer Fiore, of the Westerly Rhode Island Police Department, responded to a call from Nunzio Gaccione, who indicated that an individual with whom the officer was familiar, due to some disturbances and possible drug activity, had threatened to send over two black males with a gun to start some trouble at his house. About five minutes before Officer Fiore's arrival, Gaccione told him he saw two African-American men in a small gray or black vehicle drive by his home. Approximately thirty minutes later, the officer saw the plaintiff driving a gray vehicle

heading in the direction of Gaccione's residence. He and two back up officers conducted a high-risk felony stop.

On review of the grant of summary judgment, the Court had to determine whether this amounted to an investigative stop or was so intrusive as to constitute a *de facto* arrest. "Where police actions taken during a detention exceed what is necessary to dispel the suspicion that justified the stop, the detention may amount to an arrest and is lawful only if it is supported by probable cause." The Court concluded in this close case, the officers' actions did not go beyond an investigatory Terry stop. Even based on the complainant's sketchy information, the officers were entitled to draw their firearms because they were faced with a report of an armed threat. Upon restraining plaintiff, they immediately holstered their weapons. The use of handcuffs was reasonably necessary to carry out the legitimate purpose of their stop without exposing themselves, the public or the suspect to undue risk of harm. The use of back up officers and placing the suspect in the back of the cruiser did not convert the stop into a custodial situation.

Here, they had information that a suspect was currently armed and that a crime involving violence may soon occur. Also, the detention of no more than fifteen minutes was reasonable as the officers diligently pursued their investigation to confirm or dispel the suspicions. The Court cited a Sixth Circuit decision, which was almost identical, Houston v. Does, 174 F.3d 809 (6th Cir. 1999), where the plaintiffs, suspected of a shooting, were ordered out of their car by three officers, handcuffed, placed in the back of a police cruiser and questioned about the shooting prior to being released thirty minutes later. In evaluating the reasonableness of the officers' actions and the reasonable suspicion for the initial stop, the Court cited U.S. v. Sharpe for the proposition that it should not indulge in unrealistic second-guessing in cases where law enforcement officers must make quick decisions in potentially dangerous situations.

Young v. Prince George's County, Maryland, 355 F.3d 751 (4th Cir. 2004)

Young, an off-duty FBI agent, and his neighbor were stopped because the vehicle they were towing did not have proper lights. Upon complying with the officer's orders to sit on the curb and place their hands on their heads, Young voluntarily informed the officer that he was an off-duty law enforcement officer, was armed and had his credentials in his automobile. The officer allegedly handcuffed Young, grabbed him by his neck, placed him in a headlock, spun him around throwing him to the ground and kneed him in the back. He then retrieved a 38-caliber firearm from Young's front pocket and then struck him in the back of the head with his forearm, telling him to shut up when Young complained about the use of force. After confirming Young's status, he was released twenty-five minutes after the stop. The district court granted summary judgment on the false arrest and excessive use of force claims.

The central issue was whether the officer's use of excessive force escalated the investigative stop into an unlawful arrest. The court stated that brief deprivations of a suspect's liberty do not convert a stop and frisk into an arrest as long as the methods of restraint used are reasonable under the circumstances. It then cited prior precedent allowing officers to block an automobile, draw their weapons and handcuff a suspect without transforming a stop into an arrest. In this case they found that the method of restraint used by the officer did not cross the line between a stop and an arrest. As the officer was alone when he stopped two passengers, one

of whom stated he was carrying a firearm, Officer Hines was entitled to protect his safety by taking reasonable measures designed to disarm Young.

Even though the officer could not be held liable for a false arrest, the court did find that there were issues of disputed fact as to whether the use of force was actionable under Section 1983. The officer stopped plaintiff for a minor motor vehicle violation, plaintiff and his companion were fully cooperative and the plaintiff immediately volunteered that he was a law enforcement officer with a weapon. It was not readily apparent to the court why Officer Hines, after handcuffing the detainees, needed to grab Young from behind, place him in a headlock and throw him to the ground. Even more questionable was why, after being down on the ground, the officer used the additional force against someone who posed little, if no threat.

Kopec v. Tate, 361 F.3d 772 (3rd Cir. 2004)

Responding to an anonymous call, Officer Tate found plaintiff and his girlfriend trespassing while frolicking on a frozen lake. He did not intend to arrest them, but did want their names for a report after they complied with his demand to get off the ice. Plaintiff Kopec repeatedly refused and instructed his girlfriend not to give her name. Annoyed, the officer arrested and handcuffed him. Kopec claimed that within ten seconds he began to lose feeling in his right hand and asked Tate to loosen the handcuffs, but Tate did not do so. Kopec then asked if "this is what he does when people don't give him information." Over the next ten minutes, (officer claims 4 to 8 minutes), Kopec repeatedly told the officer he was in unbearable pain and begged him to loosen the handcuffs.

He claims to now have permanent nerve damage in his right wrist for which a hand surgeon treated him for over a year. The court found that the officer was not entitled to qualified immunity as a citizen has a right to be free from the use of excessive force in the course of handcuffing and a reasonable officer would have known at the time that excessive force in handcuffing violates the Fourth Amendment. In this case, there was no justification for the officer's failure to respond to Kopec's pleas. If the officer had been engaged in apprehending other persons, or dealing with other imperative matters, the result may have been different.

King v. City of Eastpointe, 86 Fed.Appx. 790 (6th Cir. 2003)

Two African-American brothers, ages 14 and 13, claimed they were illegally stopped and searched by an officer. The officer observed them in the parking lot of a high crime area known for thefts, coming and going from fast food restaurants without food and claiming that they were there to buy food without money. The older brother explained that there was a half-day of school, but was uncooperative and refused to provide his name. The officer separated the two by placing the older brother in the police cruiser after frisking him in a manner that was described by the brother as "overly intrusive." He claimed the officer grabbed his underwear and pulled it back, grabbed his private part and went into his pocket and grabbed his keys.

The Court found that based on the officer's observation of the brothers' actions, there was not reasonable suspicion to believe they were involved in a violation of a law, however, his erroneous but reasonable belief that they were truant was sufficient basis for the stop. There

was, however, sufficient basis for the plaintiffs to claim that the officer's ACTIONS were unreasonable. Given the older brother's claims, even if a frisk was permitted as a precautionary check for weapons, the grabbing of his private parts was highly intrusive and went beyond the purposes of the investigatory stop.

The plaintiffs also claim that the stop was racially discriminatory. As evidence, they submit a memo from the chief to the city manager that included a statement, "My instructions to the officers were to investigate any black youths riding through our subdivisions." Even if the instructions were discriminatory, there was no evidence of a causal connection between these instructions and the stop conducted by the officer, as he was a recruit studying at the academy at the time the order was issued and there was no evidence indicating he was aware of the order.

Plaintiffs also claim that they were stopped on two prior occasions, however, there was no evidence that they were treated differently than persons of other races or ethnicities. The officer's statement that "Two black males had come over and stole bikes," did not show discriminatory intent because it did not show that they were targeted solely because of their race, but also because of their number (2) and their mode of transportation (bikes). The officer's reference to one of the boys as "boy" could be interpreted as racially derogatory raising an issue of fact as to whether the officer's actions were based on race.

Plaintiffs' claim of supervisory liability failed because the order in question was issued by the chief prior to his becoming chief and, therefore, at the time he was not the policy maker. There was also the absence of the aforementioned causal connection. Finally, the Court noted that a failure to act or to make a serious investigation of similar incidents of discrimination can support a claim for municipal liability. In this case, the plaintiffs' claim of ratification based on a failure to investigate the prior alleged discriminatory bike stops did not succeed because it was not clear that these bike stops were in fact discriminatory and the city did investigate, but simply determined that the plaintiffs' rights were not violated.

The Court describes several other incidents in which the plaintiffs' claim that they were unlawfully stopped. In all but one of these incidents, the Court found that the officers had reasonable suspicion for their stops and there was no evidence of racial discrimination. In the one potentially inappropriate stop, the officer claims that he stopped the vehicle based on his observation that the air freshener extended more than 4 inches from the top of the windshield, that there was a crack in the windshield and that the plaintiffs were not wearing seatbelts. The plaintiffs argued that they had seatbelts on, the air freshener was not in an unlawful location and that the officer could not have seen the cracked windshield prior to the stop. Because of these disputed issues of fact, the officers were not entitled to summary judgment.

Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004)

Plaintiff, a truck driver who was stopped because his tag light was not appropriately illuminated, was tasered and arrested for obstruction after he complained that the officer was blinding him with his flashlight, repeatedly stated he felt he was being harassed and did not retrieve his paperwork after being asked five times to do so. The appellate court upheld summary judgment for the defendant officer.

Plaintiff first claimed that the reason for his stop was pretextual and was done solely because plaintiff was an African-American. The only question was whether the officer had reason to believe there was a motor vehicle violation. Plaintiff's claim that when he picked up his truck at midday the tag light was working was insufficient to create a genuine issue of fact contradicting the officer's position that the light was not working on the night in question.

The Court also found that the officer had probable cause to make the arrest as it was undisputed that the officer instructed plaintiff to retrieve the documents five times, plaintiff failed to comply and instead accused the officer of harassing him, yelled at him to take him to "fucking jail" and acted in a confrontational and agitated manner, pacing back and forth while repeatedly yelling at the officer. His actions hindered the officer in completing the traffic stop.

Finally, the Court found that the use of the taser without first informing the plaintiff that he was under arrest and commanding him to comply was not objectively unreasonable. Given the plaintiff's confrontational manner, a verbal arrest accompanied by an attempted physical handcuffing may well have escalated a tense and difficult situation into a serious physical struggle in which either the officer or plaintiff might have been seriously hurt. The one time shocking was reasonably proportionate to the need for force and did not inflict serious injury. In fact, the police video showed plaintiff standing up, handcuffed and coherent shortly after the taser gun stunned and calmed him.

Bolton v. Taylor, 267 F.3d 5 (1st Cir. 2004)

At 10:00 a.m., a prostitute/drug addict was seen getting out of the plaintiff's car in an area she frequented. Upon seeing the officer, the prostitute gave him a mischievous smile and the plaintiff gave him a quick glance, looked away, appeared to be nervous and left the parking lot at a high rate of speed. After being pulled over, they engaged in an altercation that left the plaintiff with severe injuries. A jury returned a verdict of $175,000.00, which was reduced by remittitur to $17,500.00. The issue on appeal is whether the officer had sufficient facts to justify reasonable suspicion for his stop.

The court, citing Ornelas v. United States, 517 U.S. 690 (1996), determined that when the facts are undisputed, the issue of probable cause or reasonable suspicion is left to the court. The court found no factual basis for the officer's claim that he had reasonable suspicion to believe that the plaintiff was involved in a drug transaction, driving under the influence or speeding or driving recklessly. This left only the potential crime of soliciting a prostitute. The court found that although the evidence was slim, it was sufficient to amount to reasonable suspicion.

Their one concern was the officer's admission that in nine years he never bothered making an arrest for prostitution and was not interested in doing so in this case as officers in his town were too busy to get involved in that type of police work. The motivation of the officer was brought into further question by the prostitute's statement that officers did not arrest her clients, but merely stopped them out of humor or malice. Unfortunately for the plaintiff, the officer's intent and motivation are irrelevant and the only question is whether or not he could have had reasonable suspicion for the stop pursuant to Whren.

Excessive Force

Brown v. City of McComb Mississippi Police Department, 84 Fed.Appx. 404 (5th Cir. 2003)

Plaintiff appeals the verdicts in favor of the defendants based on inconsistent responses to special interrogatories by the jury. The jury found that plaintiff was not resisting the officers during the altercation in his driveway. The jury also found that the officers' use of force, resulting in a serious eye injury, was not excessive. The Court found that these answers were reconcilable in that the officers could have reasonably believed that the plaintiff was attempting to resist them, or to flee as he had done during the eleven mile pursuit, even though plaintiff's actions may not have constituted resisting in some particular legal sense.

Wilkins v. City of Oakland, 350 F.3d 949 (9th Cir. 2003)

A plain-clothes narcotics investigator wearing a gray, hooded sweatshirt, apprehended a motor vehicle thief and had him at gunpoint lying on the ground. Two uniformed officers, looking for the same car thief, observed what they believed to be a private individual pointing a gun at the man lying on the street. One of them hollered, "He's got a gun," and neither ordered Wilkins to drop his gun. Within seconds, they fired thirteen shots killing the officer.

The issues of disputed fact involve whether or not they knew that this individual was a police officer, since the law is clearly established that the Fourth Amendment bars the use of deadly force against a fellow police officer affecting an arrest. Another officer present said, "He's a cop," or, "That's Will." There was also evidence that Officer Wilkins pulled off the hood of his sweatshirt, turned towards the officers and said loudly, "It's me, Willie," before turning back to the suspect. The court upheld the denial of summary judgment.

Cunningham v. Hamilton, 84 Fed.Appx. 357 (4th Cir. 2004)

Stating that not every discrepancy creates a triable issue of fact, the Court ruled that the disputed issue of fact as to whether or not plaintiff had his gun pointed at the officer or down by his side at the time of the shooting did not affect the inquiry of whether the officers reasonably and objectively believed that their safety was in danger.

Robinson v. Nolte, 77 Fed.Appx. 413 (9th Cir. 2003)

The appellate court upheld a jury award of $1,000,000.00 in compensatory damages for gunshot injuries inflicted during plaintiff's arrest. The officer testified that plaintiff was holding a shotgun pointed at the officer at the time that he fired to protect himself. The plaintiff claimed that the shotgun was on his lap while he was lying in bed with his hands up in a surrender position. The forensic and physical evidence supported the plaintiff's story, as the bullet passed through his hands and there was no blood or other tissue on the gun, which would have been the case had he been shot through the hands while holding the weapon.

Cowan v. Breen, 352 F.3d 756 (2nd Cir. 2003)

As an officer followed a suspicious vehicle, he learned that the vehicle was registered to an individual who had a prior criminal history. He pulled the vehicle over after noticing that the driver was driving erratically. When the male driver, Guerrette, stated that he did not have a license and the female passenger, Cooper, indicated that she was not carrying identification, the officer ordered Guerrette out of the car. Upon patting him down and finding a substance that resembled narcotics, Guerrette ran into the woods. Breen attempted to chase him but lost him. As he walked back to his police cruiser, he observed the Camaro coming towards him with its headlights on. Claiming he waved his arms to signal the vehicle to stop and fearing for his safety, Breen fired twice at the oncoming car. The second shot went through the driver's side window killing Cooper who was then driving the vehicle.

The Court upheld the denial of summary judgment finding disputed issues of fact. Plaintiff claims that Cooper was driving slowly, that Breen was not in front of the vehicle but substantially off to the side when he fired the second (fatal) shot, that he did not wave his hands and that the vehicle made no sudden turns as it traveled down the road. Plaintiff also claimed that Breen, in his deposition, stated he fired the second shot not because he believed he was in danger, but because he was trained always to fire twice. Further, even if Breen believed he was in grave danger, plaintiff's expert witness stated that proper police procedure when facing an oncoming vehicle is to get out of the way rather than to shoot, since shooting may disable the car or driver and put the police officer and possibly bystanders in greater danger. Under the plaintiff's facts, Breen could not have reasonably believed that his conduct was lawful, and therefore he was not entitled to qualified immunity.

The Town was also not entitled to summary judgment, since even if Breen is ultimately determined to be entitled to qualified immunity, if proof that Cooper's constitutional rights were violated by the Town's failure to train Breen or because of its "double taps" policy, liability could still attach.

Hernandez v. Jarman, 340 F.3d 617 (8th Cir. 2003)

At around 3:00 a.m., Wyoming officers began to pursue Six Feathers who was driving erratically. After a highway pursuit of 45 miles at speeds reaching 100 miles per hour, the pursuit entered South Dakota. During the course of the subsequent pursuit, the officers requested road spikes and a highway patrol airplane monitored the pursuit, Six Feathers successfully evaded several roadblocks, including a rolling roadblock. One of the officers' vehicles became disabled and another spun out after it collided with Six Feathers' vehicle. The pursuit continued until Six Feathers entered a pasture. He then turned his vehicle around and came back in the opposite direction towards the officers. One grabbed a shotgun and either before, during or after colliding with an officer's vehicle, fired four shots killing Six Feathers.

The district court found disputed issues of fact as to Six Feathers' intent and the sequence of the shots. The court stated that the reasonableness of use of deadly force is not judged from the unknowable intentions of the victim, but what a reasonable officer could conclude the intentions were. The officer claimed he fired two shots as Six Feathers' car drove into the other officer's vehicle, and another two shots after Six Feathers backed up and started to drive toward

him. The plaintiff claims that all four shots were fired after Six Feathers collided with the officer's vehicle. This and other minor factual discrepancies would not change the result that Six Feathers was continually alluding the officers, took them on a lengthy and dangerous chase and near the end of the pursuit, intentionally drove his car directly at the officers thereby giving officers reason to believe that Six Feathers posed a significant threat of death or serious physical injury.

Haugen v. Brosseau, 339 F.3d 857 (9th Cir. 2003)

Haugen and Tamburello were in the business of selling drugs and occasionally fixing cars. When their partnership dissolved, Haugen allegedly stole his partner's tools resulting in an investigation by Brosseau. During the investigation, she learned that Haugen was wanted on felony no-bail warrants based on drug and other offenses. Two days later, Brosseau responded to an altercation in which Tamburello was beating Haugen. A pursuit ensued and Brosseau saw Haugen running toward his jeep. Brosseau ordered him, at gunpoint, to get out of the jeep. As he attempted to start the vehicle, Brosseau began to bang on the window with her handgun. Just after she broke through the window, Haugen succeeded in starting the jeep. Before he pulled away, or just after he started to pull away, she shot him in the back.

The Court determined that the use of deadly force was objectively unreasonable and denied Brosseau's motion for summary judgment. The Court responded to Brosseau's many justifications including:

> **Plaintiff's Prior Crimes:** Drug crimes and burglary are serious offenses, but the question is whether the officer has probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm. Brosseau had no such probable cause.
>
> **Plaintiff's Potential Possession of a Weapon:** Brosseau stated that she thought plaintiff was running to the vehicle to retrieve a weapon and while in the car he reached down on the floorboard and just as he started the car, dived forward as if to grab something from the floorboard, which she feared might be a weapon. Other witnesses did not see any diving motion and the Court concluded that the movements were not sufficient to justify deadly force.
>
> **Impending Escape:** The fact that she shot the plaintiff when he was either stopped or had barely moved a number of feet contradicted her claim that his escape in the vehicle included his driving in an erratic manner. The officer provided no specific evidence to support her fear for the safety of fellow officers.
>
> **Need to Prevent High Speed Pursuit:** The objective facts were insufficient to show that the plaintiff posed a significant threat of death or serious physical injury to the officer or others. He had already remained at large for several months while the warrant was outstanding and there was no reason to believe that his freedom would result in immediate threat to public safety. "A ruling that allowed officers to use deadly force to prevent all vehicular escapes would have the paradoxical result that officers could

reasonably shoot to kill even when, under state law, they could not reasonably initiate or continue a chase." The Court went on to describe a number of Circuit Court cases involving use of deadly force during pursuits in extreme circumstances. The Court also determined that there were insufficient facts to support a ratification theory against the municipality. St. Louis v. Traprotnik, 45 U.S. 112 (1988).

Lucero v. City of Albuquerque, 77 Fed.Appx. 470 (10th Cir. 2003)

Plaintiff is a mentally retarded, six foot tall, 200+ pound man, housed in a mental health care facility due to significant behavioral problems including violent outbursts and attacks on caregivers. One incident was so bad that police responded, finding staff members complaining that they were tired of restraining Mr. Hildebrandt in fear of injury if they released him. The officer applied handcuffs. Shortly thereafter, CIT officers arrived and replaced the standard cuffs with flex cuffs. They were told the doctor was on the way and that the plaintiff would be transferred to another medical facility within forty-five minutes. After that time, they were told the doctor would be another forty-five minutes. The officers decided to leave and based on the request of staff members, left Mr. Hildebrandt in the flex cuffs.

As it turned out, the doctor did not arrive until even later and it was determined that Mr. Hildebrandt should not be transported until the next morning. Family members called police who, contrary to staff's request, removed the flex cuffs. The district court found that the officers' use of cuffs did not amount to unreasonable use of force, however, leaving him unattended and unmonitored and restrained for a prolonged period of time was constitutionally unreasonable. The appellate court rejected this abandonment theory, determining that there was no Fourth Amendment issue in that during the first forty-five minutes the application of the flex cuffs was reasonable. After the officers left and the plaintiff was in the control of trained mental health workers, there was no longer a Fourth Amendment issue. The officers' discretionary decision to leave was not then found to be shocking to the conscience under the Fourteenth Amendment substantive due process test.

McCurdy v. Dodd, 352 F.3d 820 (3rd Cir. 2003)

Nineteen year old Donta Dawson was sitting alone in a parked car with the engine lights running and the radio, headlights and interior lights on. Officers pulled up in their cruiser and asked why he was parked in the street and whether he needed assistance. Dawson looked at them and then looked away without responding. The officers exited their car and approached, again asking if he needed help, to which he shrugged his shoulders and turned away.

The officers then demanded that he raise his hands, yelling obscenities, with their weapons drawn. When he did not respond, one of the officers reached in removing the ignition key and pointed his weapon directly at Dawson demanding that he show his hands. Dawson remained silent. One of the officers attempted to pull Dawson's left arm out without success and then retreated, telling his fellow officers that Dawson had a gun. After further demands, Dawson began to move his left arm and the officers fired, fatally shooting Dawson in the head. Dawson was unarmed.

This case raises the typical questions about how to communicate and deal with an apparently emotionally disturbed individual. The Court did not address this issue because the matter settled for $712,500.00. The issue that remained on appeal was the distribution of these funds as Dawson's mother and his unwed birth father, who did not participate in his upbringing, fought over the distributions. Even after they settled and releases were drawn up, the father continued his constitutional claim against the police.

Fortunately, the Court found that the father did not have due process rights because the Supreme Court's ruling in Stanley v. Illinois, 405 U.S. 645 (1972), provided him with a liberty interest in the companionship, care, custody and management of his children. This right has never been expressly extended to the companionship of independent adult children. The Seventh and Tenth Circuits have recognized the parental interests in an adult son, however, the Third Circuit joins the district and First Circuit in holding that the due process protections do not extend to parent's liberty interests in their relationship with his or her adult child. Another non-stated lesson in this case is to ensure that all parties who may potentially be entitled to damages sign complete releases at the time of settlement.

Gaddis v. Redford Township, 364 F.3d 763 (6th Cir. 2004)

Plaintiff, an emotionally disturbed man, was seen swerving within his lane and apparently leaning to one side. After several failed attempts, the defendant officer finally stopped the plaintiff who stated that his license was suspended and handed the officer an expired license. When ordered to get out of the car, the officer told him to remove his hands from his pockets. The video shows the officer jumping back, visibly alarmed. The officer claims he had a knife in his hand, which cannot be seen in the video.

Three officers were present during the succeeding two or three minute standoff. Plaintiff said to the stopping officers, "Why are you doing this to me, Chris, like you did to me in California?" None of the officers were named Chris or had ever encountered Gaddis in California. Plaintiff then said he wanted to leave, at which point the stopping officer sprayed him with pepper spray. The second officer clambered over the trunk trying to grab the plaintiff. In the videotape, plaintiff appears to be swinging his arms in what the Court interprets to be a stabbing motion toward the officer. Two officers then fired a total of 16 shots at the plaintiff.

The first issue was whether the initial stop of the plaintiff was reasonable. Based on the above-stated facts, the majority determined that the officer had reasonable suspicion that plaintiff was intoxicated.

The next question was whether Bain's grabbing of Gaddis as he got out of the car was unconstitutionally excessive force. Even minor use of force is constitutionally excessive if totally gratuitous. This force was not gratuitous as the officer intended on preventing the plaintiff from fleeing and was going to conduct a pat down. Such action was reasonable when dealing with a suspect who had previously refused to stop and appeared to be disoriented. The next three use of force issues depend on whether or not there was an issue of fact as to whether or not the plaintiff had a knife. Three of the officers saw plaintiff with a knife, one did not and the videotape did not show a knife. The Court explained, given the position of the non-viewing

officer and the poor quality of the videotape, there was no disputed issue of fact regarding the presence of the knife.

The next issue was whether or not the use of pepper spray was reasonable. The Court noted that the main purpose of non-lethal, temporarily incapacitating devices is to give police options short of lethal force to take a person into custody. Since plaintiff was armed with a knife and refusing to submit to the arrest, the use of pepper spray was objectively reasonable. An expert testified that the use of pepper spray as well as the officers' attempt to grab the plaintiff after the spray amounted to inappropriate tactics in dealing with an emotionally disturbed person.

He claimed that the officers should have acted in a non-confrontational manner that would ensure the plaintiff would not be provoked to violence. The Court agreed that the apparent mental state is one of the facts that officers should take into consideration in using force and cited a prior holding in which inadequate training of the Cincinnati Police Department may have contributed to the shooting death of a mentally ill decedent. In this case, the Court found that the expert's affidavit was not sufficient to create a material issue of fact as to the reasonableness of these uses of force.

Finally, the officers' use of deadly force was objectively reasonable in that they saw the plaintiff strike a fellow officer with a knife. The use of a single volley of 16 shots from two officers did not make this use of force unreasonable.

The dissenting opinion noted that the stopping officer's credibility should have been taken into consideration as he was subsequently convicted of criminal sexual conduct. They also indicated that there were problems with the collection of evidence, which bore on whether or not there were issues of fact in the case including the failure to secure a second knife found on the plaintiff's front seat, failure to fingerprint the knife found outside of the scene, and the failure to preserve the officer's allegedly bloody T-shirt. The Court also noted that prior to the use of deadly force, the officer who had allegedly been stabbed was far enough away so that he was no longer in danger.

False Arrest

Braun v. Baldwin, 346 F.3d 761 (7th Cir. 2003)

The plaintiff accompanied William "Whistleblower" Currier at the courthouse to hand out pamphlets and speak out on the advocacy of jury nullification. They had permission to do so by the sheriff. A deputy sheriff, Frank Franckowiak, knowing that someone had called with regard to a disturbance at the courthouse, approached Braun and asked him what his business was. When Braun refused to answer, Franckowiak told him to step aside. When Braun refused, he was arrested for disorderly conduct.

Braun's free speech claim failed for two reasons. First, there was a lack of evidence that the sheriff even knew that Braun was there to assist Currier in advocating jury nullification. Therefore, his arrest could not have been intended to curtail Braun's freedom of speech. Second, First Amendment rights are not absolute and "A state may adopt safeguards necessary and

appropriate to assure that the administration of justice at all stages is free from outside control and influence." Cox v. Louisiana, 379 U.S. 559 (1965).

The Court stated that it could not think of a more reasonable regulation of time, place and manner of speech than to forbid the advocacy of jury nullification in a courthouse. The Court found that his conduct in refusing to explain his actions to the officer, threatening to sue him, refusing to step aside, continuing his argument in front of a courthouse's clientele, where it is important to preserve a calm atmosphere and in light of the importance of protecting federal buildings after the Oklahoma City bombing, the officer had adequate probable cause to make an arrest for disorderly conduct. The dissenting opinion did not agree.

In situations like this, even when there is arguable probable cause or even if there is actual probable cause, officers should attempt to resolve such situations without arrest.

Officers should:

- Maintain control;
- Be patient;
- Don't argue;
- State the official position clearly and succinctly;
- Advise the citizen of available options;
- Allow the citizen limited time and opportunity to state their position;
- Give the citizen reasonable time to comply with your lawful orders.

Arrests should be made when:

- After the above actions, there appears to be no indication of compliance;
- Actions of the citizen(s) cause a disorderly conduct or breach of the peace;
- The situation seems to be escalating to the point of potential violence.

This is not a weak response. It is practical and recognizes the difference in perspective between officers and certain citizens.

Reasons to take the above actions are:

1. 1. **Police Image** – The public perception of an officer patiently trying to reason with a citizen who may honestly but erroneously believe they are complying with the law is better than a knee jerk, tough guy enforcement action, which may be seen as unnecessary.

2. 2. **Time -** The time it takes an officer (5 minutes) to attempt to reason and peaceably resolve such a situation is far less that the time it takes to arrest, write a report and deal with the subsequent prosecution of such a case.

3. 3. **Government Cost** – The cost of law enforcement and judicial personnel in processing and dealing with a criminal case is far greater than the writing of a three-paragraph incident report or no report at all.

4. 4. **Liability Risk** – There is no liability risk in reasoning with a citizen, however, an arrest and possible use of force may lead to liability claims against the officer and the department costing taxpayers tens of thousands of dollars.

5. 5. **Potential Injury** – There is no potential injury in talking to a citizen, however, physical contact is a necessary component of an arrest sometimes leading to the injury of the citizen and/or officers with all the resulting costs.

In conclusion, attempting to reason and peaceably resolve a situation serves everyone's interest, while making an immediate arrest, absent the above arrest factors, serves no one's interest.

Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003)

Following the removal of Elian Gonzalez, Miami experienced a number of violent street protests, which were covered by the media. The plaintiff, a cameraman, had filmed a number of these protests and contended that on other occasions, officers had allowed him to conduct his shoot in the street before complying with their instructions to remove himself from the area. On this occasion, the plaintiff was filming the arrest of an NBC cameraman when he was told by an officer to get out of the street. He backpedaled toward the sidewalk, continuing to film the arrest when defendant officer Pastor grabbed him from behind and with another officer, pulled him to the ground, pinning his arms behind him and handcuffing him.

The entire incident was filmed, including plaintiff's pleading that he would go peacefully. Plaintiff was charged with resisting, obstructing or opposing an officer, but after viewing the videotape, the State's Attorney dropped the charges asking for a liability release, which was refused. The district court's denial of summary judgment on the false arrest and excessive force claims was overturned by the appellate court.

The appellate court found that the officer was entitled to qualified immunity as she had probable cause to arrest the plaintiff for violating the Florida statute, which prohibited persons from walking in a roadway where there are sidewalks and no circumstances requiring the citizen to be in the roadway. The district court and dissenting opinion did not agree that an officer should be entitled to qualified immunity when no probable cause exists for the offense charged and the offense, which is claimed to justify the arrest, is raised only after the civil suit is brought.

The appellate court found that plaintiff's argument that he had had prior permission did not diminish the probable cause, especially since he did not name any officers, locations or circumstances under which he had been given permission. The dissenting opinion stated that this did create an issue of fact with regard to notice of the unlawfulness of the plaintiff's actions.

The City of Miami policy stated, "No warrantless arrest of media personnel for non-felonious acts arising out of the pursuit of the news gathering function will be made without the express authority of the senior on-duty commanding officer or the staff duty officer." The appellate court found that the policy did not vitiate probable cause citing prior precedent holding that a Department of Justice's dual prosecution policy did not confer enforceable rights on a criminal defendant. It also stated that it could not find any case that even remotely suggested that a possible violation of an internal law enforcement guideline strips an officer of qualified immunity for an arrest founded on sufficient cause.

The dissenting opinion noted that Chief Martinez explained that the policy granted a higher degree of courtesy to members of the media and that if a member of the media complies with a police officer's request to move, such compliance should be the end of the incident. The dissenting opinion concluded that this policy should be applied in evaluating the officer's actions, agreeing with the district court, which stated, "When an obvious member of the media approached a police officer in a cleared street, is instructed to return to the sidewalk, and complies with the instruction, a police officer should be aware that a custodial arrest based on interference with a police officer is illegal." It is undisputed that the officer knew plaintiff was a newsman and that put her on notice that she was not supposed to make an arrest without permission from a supervising officer.

Finally, the appellate court found that the use of force was not excessive. Any arrest justifies some use of force and the application of force in this case was *de minimus*. Forcing the plaintiff on the ground and placing handcuffs may have been unnecessary, but it was not unlawful. The Court cited Nolin v. Isbell, 207 F.3d 1253 (11th Cir. 2000), in which it found force to be *de minimus* where an officer grabbed the plaintiff from behind by the shoulder and wrist, threw him against the van three or four feet away, kneed him in the back and pushed his head into the side of the van, searched his groin area in an uncomfortable manner and handcuffed him. (This writer suggests that such *de minimus* force should not be attempted outside of the Eleventh Circuit.)

In a footnote, the Court addressed the aggravation of a pre-existing shoulder injury. "What would ordinarily be considered reasonable force does not become excessive force when the force aggravates, 'however severely,' a pre-existing condition, the extent of which was unknown at the time." Rodriguez v. Farrell, 280 F.3d 1341, 1353 (11th Cir. 2002).

Ochana v. Flores, 347 F.3d 266 (7th Cir. 2003)

Around 6:00 p.m., the plaintiff was found blocking traffic in an intersection, either asleep or passed out. He did not awaken until officers had made several attempts to wake him. After the plaintiff was out of the vehicle, one of the officers saw a white substance in a clear, unlabeled plastic sandwich bag sticking out from a backpack and believed it was either cocaine or heroine. He also found a brown bottle that appeared to be a prescription drug labeled in Spanish. Plaintiff claimed the powder was creatine (a muscle builder) and the brown bottle contained his thyroid medication. Plaintiff was arrested for obstruction of traffic, possession of a controlled substance and forging or altering a prescription. He spent two nights in jail. The charges were dismissed

against him except for the obstruction of traffic for which he received a fifty-dollar fine. He claimed his vehicle was searched and he was arrested without probable cause.

The Court found that the officers' first justification for a search incident to an arrest did not justify the search because plaintiff was not under arrest at the time of the search and even if he was going to be issued a traffic citation, a search incident to an arrest could not be conducted. The Court did find that the search was justified under the probable cause theory. Finding the plaintiff passed out at 6:00 p.m. at an intersection would give officers probable cause to believe he was intoxicated and that the intoxicating agents would be found in the vehicle. The false arrest claim failed since the presence of probable cause to arrest for any offense would bar the unlawful arrest claim. He could have been taken into custody for just the obstruction and given his condition, the reality was that it was unlikely that he would not have been taken into custody.

Renda v. King, 347 F.3d 550 (3rd Cir. 2003)

Plaintiff complained over the phone that her boyfriend, a state trooper, had slammed her into a wall, however, she did not want to give a statement or file charges, but just wanted to be left alone. Defendant troopers went to her friend's apartment where she was interviewed, gave a written statement, but did not mention the assault. The defendant troopers stated that when they asked why she didn't mention the assault, and said she had been lying in the earlier phone conversation. She was subsequently arrested for filing a false complaint. After her statement was suppressed because defendants did not provide her Miranda warnings, her case was nolled. She sued claiming her interrogation without Miranda subjected her to an unlawful search, arrest, imprisonment and malicious prosecution. A jury returned a verdict in her favor in the amount of $80,000.00 on the malicious prosecution claim.

The appellate court vacated the judgment finding that evidence regarding Trooper King's good character for truthfulness should not have been excluded. Her challenge to Trooper King's credibility was made during an argument that he would lie and engage in illegal police investigative techniques and frame an innocent person. This was suggestive of corruption and improper performance of official duties. The Trooper should have been allowed to contradict this claim with evidence of good character and truthfulness. Relying in part on Chavez v. Martinez, the Court found that the troopers' failure to advise the plaintiff of her Miranda warnings during her custodial interrogation could not serve as the basis for her Section 1983 claim unless the confession was used against the plaintiff. They noted room for argument as to whether or not such a statement need be used at trial, or whether using it to obtain an indictment may suffice.

Lawyer v. City of Council Bluffs, 361 F.3d 1099 (8th Cir. 2004)

The Lawyer brothers, Michael, the driver age 17, and Timothy, the passenger age 21, were driving through Iowa on their way home to Wisconsin after a ski trip to Colorado. Upon being stopped for speeding, defendant officer shined his flashlight into the vehicle and saw Timothy zip up a small red pouch and place it in the glove compartment. He asked what was in the bag, to which Timothy replied it was nothing important. He asked if he minded if he took a look at it and Timothy replied that he'd rather not. Officer Clark then repeatedly stated that the

bag looked like drug paraphernalia and asked if he could be permitted to look at it. Eventually, he commanded that the bag be handed to him, but Timothy repeatedly refused. Only after the officer threatened to start spraying pepper spray into the car and repeatedly demanding that Timothy get out of the car, did the officer finally reach over and open the passenger side door, stating to Timothy, "It's entirely up to you. Open it up."

Timothy then removed the red pouch and emptied its contents, which contained only candy. With a second officer present, Clark wrote Michael a citation and repeatedly asked him to get out of the car to sign the citation, to which Michael refused. Michael said that he was very willing to sign the citation, but he was cold, did not want to be filmed, (the cruiser video was operating), was afraid of traffic and felt threatened by the officer. After repeatedly asking Michael to get out of the car to sign the citation and telling him that he would be arrested if he refused to exit the vehicle, the officer reached into the open window, at which point Michael began to roll the window up resulting in a threat to break the window and the officers pepper-spraying Michael and accidentally hitting Timothy in the face. The boys then got out of the car. They were both placed on the ground, handcuffed and arrested.

The Court found that the search of the pouch was lawful as the officer stated he thought he saw a marijuana pipe in the pouch. "Once it is accepted that Clark reasonably thought he saw a marijuana pipe in the red pouch, then there was probable cause to search the pouch, even though Clark turned out to be mistaken."

The use of pepper spray was also found to be objectively reasonable, as at the time, Clark could believe that he was in immediate danger and faced the possibility that he could be dragged down the road with his arm trapped in the window. The pepper spraying of Timothy was accidental and therefore did not amount to excessive use of force under the Fourth Amendment.

The arrest of Michael was found to be lawful, as he had committed a motor vehicle violation. The arrest of Timothy was also found to be lawful, as during the course of the encounter, Timothy repeatedly was coaching his younger brother not to comply with the police officers' lawful orders. "The purpose of criminalizing conduct that interferes with official police action is to enable officers to execute their peace-keeping duties calmly, efficiently and without hindrance." Timothy's efforts to cause Michael to defy the officers' orders obstructed the officers by putting obstacles in the paths of officers completing their duties and hindering their efforts towards an orderly conclusion of the traffic stop.

Anderson v. Cass County, Missouri, 367 F.3d 741 (8th Cir. 2004)

Two bail bondsmen and a bounty hunter entered Shamp's home to inform her they were revoking her bond and were taking her into custody. There was an altercation when she attempted to flee and neighbors called regarding the disturbance. When officers arrived, they found the bondsmen standing over Shamp, who was crying and handcuffed. She told the officers they forced their way into her home, handcuffed her and slapped her several times. She appeared to have been handled roughly and the officers observed redness around her face and neck. Officers initially arrested the bondsmen for assault, but later the charge of burglary was added.

Charges were dropped against one bondsman while the other pled under Alford. In determining that the officers had probable cause for the arrest, the Court found that the bond revocation did not negate the criminal intent. Civil disputes do not always negate the elements of criminal intent. While the bondsmen claimed that they entered based on their bond contract, a reasonable officer could have seen their conduct as potentially criminal in nature. The bondsmen also claimed that Shamp was not trustworthy and therefore they could not rely on information she supplied to develop probable cause. The Court found that her past criminal history, officers' past response to her residence on police business and her attempt to flee from the bondsmen did not establish that on the night of the alleged assault, she was untrustworthy.

Karam v. City of Burbank, 352 F.3d 1188 (9th Cir. 2003)

Officer Sindle provided a report to Detective Miranda that Karam had entered the city council chambers and was told by him that she was trespassing. Miranda spoke to Karam, interviewed others and based on the advice of city attorneys issued a misdemeanor complaint for trespassing and delaying or obstructing a police officer. Karam appeared in court, was released on her own recognizance with a restriction that she not leave the state and appear in court in three weeks.

After the charge was dismissed, she brought a Fourth and First Amendment action against defendants. The Ninth Circuit adopted the position of the Fourth, Seventh and Fifth Circuits that a Fourth Amendment seizure only occurs when there is an actual detention. The Court went on to discuss and distinguish other circuit courts, (Second, Third and Fifth), that have found, under some circumstances, a pretrial release restriction may qualify as a seizure. Those circuits' cases involved significantly more restrictive conditions involving felony charges.

Noting the Second Circuit's opinion which relied on Albright v. Oliver, 510 U.S. 266 (1994), in which the plurality noted, "A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He's required to appear in court at the state's command. He's often subject… to the condition that he seek formal permission from the court…before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense."

The Court also upheld the dismissal of the First Amendment claim in that there was no evidence to contradict the officer's statement that he was unaware of Karam's statement or her history of criticizing the city or its officials, therefore, without such knowledge, his actions could not be construed as retaliatory.

Dorman v. Castro, 347 F.3d 409 (2nd Cir. 2003)

Plaintiffs were given appearance tickets after entering a beach by boat for swimming in violation of a state policy prohibiting individuals from accessing the beach by means other than designated land-based entrances. The Court declined to determine whether a pre-arraignment summons constitutes a Fourth Amendment seizure as there was ample probable cause for the

issuance of the summonses based on the plaintiffs' admitted manner of entering the beach and their refusal to leave.

McCullah v. Gadert, 344 F.3d 655 (7th Cir. 2003)

Following an altercation in a bar during which off-duty officer Gadert broke up the fight, the State's Attorney's office brought felony charges against McCullah, which were dismissed. The State's Attorney then substituted a misdemeanor charge of obstructing a police officer, which was also dismissed. McCullah claimed officer Gadert violated his Fourth Amendment right by providing false information about him in his incident report and through testimony offered at a preliminary hearing.

The first question addressed by the Court, was whether the Parratt rule foreclosed all constitutional claims when there is a parallel remedy under state law. The Court noted the broad reading in the First Circuit, which does foreclose claims of false arrest under the Fourth Amendment because there is an available action under state law. It rejected this position following the Tenth, Fifth and Second Circuit Court of Appeals, which allow constitutional claims even when common law torts may closely parallel the same interests protected by the constitutional rights.

The Court stated that on remand, the question should be resolved as to whether or not the summons is equivalent to a seizure within the meaning of the Fourth Amendment, and whether Gadert is individually immune from suit because McCullah appeared in court pursuant to a summons rather than a custodial arrest.

Pena-Borrero v. Estremeda, 365 F.3d 7(1st Cir. 2004)

On November 10th, plaintiff was arrested on a valid warrant and posted a $300.00 bond. On December 21st, he was awakened at home in the middle of the night and again arrested on the same warrant. Despite his protests and display of documents including evidence that he had been arrested on the same warrant and posted bond on November 10th, officers took him into custody and transported him to police headquarters. The Court found that the allegations were sufficient to state a claim for false arrest and false imprisonment and that the officers were not entitled to qualified immunity. "If any doubts remained after appellant displayed the stamped warrant, a quick phone call to the precinct presumably would have resolved them."

The Court granted the motion to dismiss on the excessive force complaint, which alleged that the officers used harsh language and handcuffed the plaintiff with his arms behind his back, exacerbating a prior non-obvious injury. The Court found that the allegations demonstrated no more than the degree of physical coercion typically attendant to an arrest. The fact that the arrest was unlawful did not automatically render the use of force unreasonable.

Lee v. Gregory, 363 F.3d 931 (9th Cir. 2004)

Defendant, FBI agent Gregory, was assigned to speak to Julian Christopher Lee, plaintiff, the brother of a fugitive, (Robert Q. Lee), who had a warrant issued out of New Jersey. When

Gregory told Julian over the phone that the law did not require him to speak with Gregory, Julian angrily told Gregory to stop harassing him, cursed and hung up. Gregory had the Dade County Sheriff's Department fax a copy of a warrant for Christopher Lee described as a black male, 6 feet 1 inch tall and 200 pounds with a Florida address and driver's license.

The date of birth and social security number on the warrant were the same as Julian's. The FBI file contained information indicating that Robert was living in Alabama under the name Christopher Lee and was using Julian's birth date and social security number. Gregory passed the warrant on to the San Diego Sheriff's Department, which executed the warrant on Julian, who was 6 feet 3 inches tall and 270 pounds, even though he stated that he had never been to Florida and was not the man named in the warrant. Four days later, after prompting by Julian's attorney, Gregory sent photographs of Robert to Florida. Officials confirmed that they matched Christopher Lee.

Julian claimed that Gregory knew he was not the man sought by the Florida warrant, but arrested him in order to obtain information about Robert. Gregory moved for summary judgment claiming he had probable cause to arrest Julian and that no clearly established law prohibited him from executing a facially valid warrant.

The Court ruled that Gregory was correct in claiming that ulterior motives cannot invalidate police conduct that is justified by probable cause. However, knowingly arresting the wrong man pursuant to a facially valid warrant issued for someone else violates the Fourth Amendment. Qualified immunity will not protect an officer in such a situation even if there is no analogous case law. Some wrongs are self-evident and every officer knows, or should know, that he needs a warrant that correctly identifies the arrestee, or probable cause, to arrest a particular individual.

McCann v. Mangialardi, 227 F.3d 782 (7th Cir. 2003)

Deputy Chief Mangialardi was on the payroll of a cocaine trafficker protecting his operation and investigating and arresting his competitors. At some point, they agreed that they needed to get rid of a federal informant. Otis Moore, the drug trafficker, planted drugs in plaintiff's car, then called Mangialardi and told him that McCann was in a certain area with drugs in his car. Mangialardi contacted the police to stop, search and arrest the plaintiff. The plaintiff sued Mangialardi for false arrest and due process violations claiming, among other things, that he created false evidence for the purpose of procuring a criminal conviction and failed to disclose exculpatory evidence.

The court discussed whether Brady v. Maryland required disclosure outside of the context of a trial. United States v. Ruiz, 536 U.S. 622 (2002). The due process clause does not require pre-guilty plea disclosure of impeachment information, however, "Ruiz indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence."

In a request for admissions, defendants stated that plaintiff has no evidence from any source that Mangialardi, or any other police officer, withheld any exculpatory evidence. Failure

to respond to this admission created conclusively that there was no evidence that the defendant withheld exculpatory evidence. Even if Mangialardi concocted a scheme to have the plaintiff arrested, there was no evidence that he conspired with Moore to have plaintiff "falsely" arrested, entitling him to summary judgment. There was no evidence indicating he knew the drugs were planted.

Chortek v. City of Milwaukee, 256 F.3d 740 (7th Cir. 2004)

Fifteen plaintiffs were among a large group of ticket scalpers arrested by the Milwaukee police. They claimed that the manner of treatment was unreasonable, that the length of their detention was unreasonable and that the policy on how to handle such arrestees was unconstitutional. The conduct of officers in handling arrestees will be judged under Atwater v. City of Lago Vista and Whren v. United States, which stated respectively, "When a defendant makes a colorable argument that an arrest, with or without a warrant, was conducted in an extraordinary manner, unusually harmful to 'his' privacy or even physical interest," review may be appropriate. "When probable cause exists, only searches or seizures conducted in an extraordinary manner require a balancing analysis."

The court found that the plaintiffs' complaint that they spent an unnecessarily long time in handcuffs in police vehicles, were subjected to thorough body searches, were unable to make phone calls and had to share holding cells with other prisoners, was not "unusually harmful" to physical interests or privacy. The arrests may have been humiliating, but they were no more harmful than the normal custodial arrest.

The plaintiffs complained that their detention between three and fourteen and one half hours was excessive. In County of Riverside v. McLaughlin, the Supreme Court noted that examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual or delay for delay's sake. The defendants explained that the length of detention was based on a backlog resulting from the arrest of large groups of people on a busy night during which officers processed the paperwork as quickly as they could. The court found that, in the absence of evidence of improper purpose for the delay, the government provided sufficient explanation.

Finally, the manner in which the arrests were executed was determined by a lieutenant and deputy chief, neither of whom was a policy maker sufficient to establish Section 1983 liability.

Search and Seizure

Martin v. City of Oceanside, 360 F.3d 1078 (9th Cir. 2004)

Doctor Trotman phoned the Oceanside Police Department to report that he was extremely concerned about his daughter's welfare. He provided the address, a description of his daughter and her vehicle. At approximately 4:30 p.m., Officer Kelly knocked on the door and rang the doorbell but no one responded. The daughter and plaintiff were inside, but did not answer because they mistakenly believed it was the plaintiff's ex-wife who had called the police. After

the dispatcher unsuccessfully phoned the daughter, the officer found an unlocked garage door and upon entering, discovered an unlocked door to the main house.

He exited the garage and spoke with a next-door neighbor who had seen a woman there three days before, and a man there the day before, and stated that both occupants' vehicles were in the driveway and they should be home. Kelly and his back up officer entered the home with their guns drawn and finding no one downstairs, they went upstairs where they encountered the daughter exiting a bedroom. After an argument about the officers not having a warrant, she produced her identification and the officers having confirmed that she was safe, left the home.

The appellate court ruled that the entry was constitutional under the "emergency aid" exception to the warrant requirement. The Circuit required three prongs for this exception:

1. 1. The police have reasonable grounds to believe that there is an emergency and an immediate need for assistance for the protection of life or property;

2. 2. The search must not primarily be motivated by an intent to arrest or seize evidence; and

3. 3. There must be some reasonable basis, approximating probable cause, to associate the emergency with the area to be searched.

Having determined that the facts supported this test, the Court moved on to the claim that the officers violated the knock and announce requirement.

The district court had found that the officers had substantially complied with the knock and announce rule and that the entry was justified by the emergency aid exception. The appellate court added to this that there was simply no violation of the Fourth Amendment. The officers knocked on the door, were in uniform and plaintiff heard and observed the officers, but chose not to answer the door. Instead he went upstairs, called his lawyer and secreted himself. "To see this set of facts as a violation of the Fourth Amendment's knock and announce rule is utterly incomprehensible. The prophylactic purpose of the rule is not served when the occupants of the home know that it is the police knocking at the door and simply leave the area and choose not to answer."

The Court chastised the plaintiff stating he was the victim of his own faulty judgment and behavior. He alone was responsible for the officers' entry after he chose to play hide-and-go-seek with the authorities. Finally, the Court stated that the citizens of Oceanside would have been justifiably outraged if the officers had delayed their community care taking responsibility only to discover that the daughter had become the victim of an otherwise preventable crime or was in need of assistance.

Harajli v. Huron Township, 365 F.3d 501 (6th Cir. 2004)

After plaintiff was arrested for beating his wife with his hands and a handgun, pointing a gun at her head and threatening to kill her, she was accompanied by police to their home to

remove her belongings (civil standby). During the removal, a moving company entered the home, a legal assistant employed by the wife's attorney arrived and the officers entered the garage, however, it is disputed as to whether they entered the actual home. The husband made a complaint that items were stolen from his house. Two days later, he went to the police station and spoke to Lieutenant Maier who told him it was a civil case and the police would not be conducting an investigation. He responded in the same manner to a request for an investigation from an officer who was a member of the Arab-American league and the husband's attorney. Sixteen days after the alleged incident, Maier submitted an arrest warrant for the wife, which was rejected by the prosecutor's office.

Plaintiff claimed police unlawfully entered his home and violated his equal protection rights. The Court held that:

1. 1. Police officers reasonably believed that wife of homeowner had authority to consent to officers' entry into home;

2. 2. Wife actually consented to officers' entry into home;

3. 3. Officers' conduct in accompanying homeowner's wife to home to retrieve her belongings did not violate homeowner's substantive due process rights; and

4. 4. Homeowner failed to show that officers treated other similarly situated persons differently, as required to establish prima facie national origin or gender equal protection claim.

Ali Shamaeizadeh v. Cunigan, 383 F.3d 535 (6th Cir. 2003)

Plaintiff owned a single family home where he resided with his fiancée, Schmitt, and rented the basement to Reed and Ford. Schmitt asked Officer Wiles to search the house as she believed it had been burglarized. During the search, he encountered a number of locked doors and smelled growing marijuana. He called for a supervisor and together, without specific consent from Schmitt, again walked through the house. They in turn called a narcotics supervisor and walked through a third time, which was followed by a telephonic warrant resulting in a fourth search during which they forcibly opened the locked doors finding 393 marijuana plants and growing equipment.

The issue was whether plaintiff had successful claims involving the second and third searches. As a starting point, it was determined that he did not have standing to sue for searches conducted in the basement apartment, as it was maintained as a separate residence, he was not in possession of the basement, he did not have the right to exclude others from that place, took no precautions to maintain a privacy interest in the basement and the fact that he owned the property was not sufficient to give him a reasonable expectation of privacy.

The Court then determined that the second and third warrantless searches were unconstitutional.

Consent: The Supreme Court has held that the scope of the suspect's consent turns on what a typical, reasonable person would have understood by the exchange between the officer and the suspect. In this case, Schmitt had asked the officer to search the premises for an intruder. Once there was found to be no intruder, and given the fact that there was no express request or permission to conduct second and third searches, the subsequent searches were found to be beyond the scope of the initial consent. The Court did discuss that in Kentucky, once consent is granted, it must be expressly revoked, and in some other states there is a principle of continuing consent, allowing officers to execute closely related searches in the absence of objection.

Exigent Circumstances: It was undisputed that the first search to look for a burglar who may have been present on the premises was based on exigent circumstances. Officers' subsequent explanations that a burglar may have been hiding in one of the locked rooms was not credible, as the initial officer admitted that he called for back up because he smelled growing marijuana and they subsequently called in a narcotics investigator. The only possible exigent circumstance was the potential need to prevent the destruction of evidence. At the time of the second and third searches, they did not even know what evidence would be found in these searches. These were merely fishing expeditions for evidence of a drug crime and therefore there was no exigent circumstance justifying the searches.

Plain View: Although the plain view doctrine would have justified the seizure of immediately incriminating drug paraphernalia during the first search, there was no justification in the second and third searches because at the time of those searches, the officers were not "lawfully located."

Probable Cause for Warrants: The Court found that evidence found in the basement was sufficient to establish probable cause that narcotics were there. The plaintiff had no expectation of privacy and therefore any evidence gathered in the basement was properly included in the warrant. Evidence discovered in the basement did not, in itself, establish probable cause to search the entire house and therefore the officers committed a constitutional violation by searching the entire residence without probable cause. The officers were entitled to qualified immunity since it was not clear to them that there was a distinct boundary between the two parts of the residence and there was some evidence that made it appear as though all occupants move freely between the basement apartment and the main floor.

Seizure of Items Outside the Scope of the Warrant: Officers seized jewelry that they claimed they believed might have been obtained with drug money and documents indicating that the plaintiff had multiple identities and was forging instruments. The Court determined that the seizure of the jewelry was unlawful, as more investigation was required to establish probable cause associating the jewelry with criminal activity, as there was nothing about the intrinsic nature of the jewelry that gave officers cause to associate it with the drug activity. The documents were also unlawfully seized since under the plain view doctrine, it could not have been readily apparent through instantaneous sensory perception that they were connected to any criminal activity. In

order to establish such probable cause, the officer would have been required to do some level of inspection.

Municipal Liability: The municipality could not be held liable for failure to train, as its officers receive training on the execution of searches and seizures and all officers were provided field manuals containing black letter law summarizing search and seizure law.

Hell's Angels Motorcycle Corporation v. McKinley, 360 F.3d 930 (9th Cir. 2004)

Police, investigating a murder and robbery, seized two truckloads of property and documents from a Hell's Angels motorcycle club. A federal agent presented an administrative subpoena for some of the items seized and even before the order was approved, the local police turned over the items including some that were not listed in the subpoena. The Court held that these items were lawfully seized pursuant to a warrant and therefore were not protected from further warrantless seizures by police. Because the Hell's Angels no longer had a reasonable expectation of privacy in documents that had previously been lawfully seized, the federal agent's subsequent search of these documents did not result in a constitutional violation.

Storck v. City of Coral Springs, 354 F.3d 1307 (11th Cir. 2003)

A child protective custody matter lasting over five and one half years and bouncing to several states, ended up with a custody order issued by the Broward County Circuit Court ordering the sheriff to take into custody in the daytime or nighttime, and if necessary break the door, where the minor child was believed to be residing. The order further instructed the sheriff that the execution shall be without delay and permitted the arrest of any person who interfered with the order. Plaintiff, the child's mother, refused to answer the door and kept the officers outside for over two hours. During a thirty to forty-five minute period, she clicked the phone between her attorney and the negotiating officer.

The negotiating officer falsely claimed that she did not know what the order was for and she was just there to issue the order regarding Storck having to appear at a hearing. She refused to allow the order to be left at Storck's front door and eventually Storck exited the apartment, was knocked to the ground and arrested for obstruction of justice. The Court found that the officers had arguable probable cause entitling them to qualified immunity. An officer could have perceived Storck's conduct as amounting to obstruction of, or resistance to, the execution of a lawful duty.

The Court found that the officers misleading Storck about the nature of the order or the use of a ruse to get her outside did not negate probable cause. Noting that the use of such subterfuge in law enforcement activities has long been recognized by the Supreme Court, the Court found that, "Thus, just as officers armed with a valid search warrant may engage in a ruse to gain entry into a private home, here, the CSPD officers, who plainly had a valid court custody order and the concomitant power to execute the order at any time, committed no violation of a clearly established constitutional right under these circumstances."

Hadley v. Williams, 268 F.3d 747 (7th Cir. 2004)

Police, seeking to arrest plaintiff for having sex with minors, called his mother and asked if she would permit the officers to enter her home to arrest her son. She answered, "only if they have a warrant," to which the officer responded that he had one. The mother, not wanting to be home at the time of the arrest, had her daughter come to the house to let the police in.

In finding that the search was not consensual, the Court noted, "the law permits the police to pressure and cajole, conceal material facts, and actively mislead," but "it draws the line at outright fraud, as where police extract a confession in exchange for a false promise to set the defendant free. The consent of Hadley's mother was procured by an outright and material lie, and was therefore ineffectual."

The Court did note that it might have been consensual if the police truthfully said that if consent were not given, they would seek a warrant. It also discussed the "plain view" doctrine, where in some Circuits if a door is voluntarily opened, anything seen in plain view may be seized. The Seventh Circuit does not agree with the Second or Ninth Circuit Court of Appeals, but does agree that if a door is opened, and officers see contraband, evidence of a crime, or a person they have probable cause has committed a crime, they may enter if exigent circumstances exist that the evidence will be destroyed or the criminal will flee.

Duarte v. Robards, 86 Fed.Appx. 270 (9th Cir. (Cal.) 2003)

Because of conflicting information, the warrant identified a downstairs apartment with an "A" and an upstairs apartment with a "B", both believed to be in control of a gang member wanted on an investigation concerning illicit graffiti art. The plaintiff, who lived in apartment B, protested that she did not know the gang member and that he did not live there. She claimed that once the police knew that this was not the suspect's apartment, they were required to discontinue the search in accordance with Maryland v. Garrison, 480 U.S. 79 (1987). The appellate court held that the issue was not whether the police were put on notice that they might be in the wrong apartment, but whether they acted in an objectively reasonable manner. Given some evidence that the gang member was in control of both apartments, notice that he did not live there was not sufficient to make their actions unreasonable.

Doe v. Groody, 361 F.3d 232 (3rd Cir. 2004)

The wife and ten year old daughter of a drug suspect were strip searched in their home during the execution of a search warrant. The affidavit included the following language:

> The search should also include all occupants of the residence as the information developed shows that [Doe] has frequent visitors that purchase methamphetamine. These persons may be on the premises at the time of the execution of the search warrant and many attempt to conceal controlled substances on their persons.
>
> This application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant. It is the experience of your co-affiants that

> drug dealers often attempt to do so when faced with impending apprehension and may give such evidence to persons who do not actually reside or own/rent the premises. This is done to prevent the discovery of said items in hopes that said persons will not be subject to search when police arrive.
>
> As a result of the information developed, your affiant requests that a search warrant…be issued for…the residence of [John Doe] and all occupants therein.

The block on the actual search warrant, which designated a description of the person or place to be searched, specifically named only John Doe. Although the block of the probable cause section specifically incorporated the affidavit, the block indicating who could be searched did not. The central question in this case is whether police can broaden the scope of a warrant with an unincorporated affidavit. The Court said they could not and the law was clearly established on this issue at the time of the search.

The Court did note cases in which an unincorporated affidavit could be used to clarify or restrict an otherwise overly broad warrant. The Court relied on Groh v. Ramirez, 124 S.Ct. 1284 (2004) to support their opinion. In Groh, the Court found the search to be unlawful because the warrant did not include a description of the person or property to be seized, even though the unincorporated affidavit specifically provided such description. The Court did note that they were mindful that search warrants and affidavits are often prepared under time pressure and should not be subjected to microscopic dissection, however, in this case the warrant did not authorize the search of the wife or daughter and there was no independent justification for such a search.

Heft v. Moore, 351 F.3d 278 (7th Cir. 2003)

Heft claims that officers executing a search warrant planted drugs found in a metal box, unnecessarily destroyed her property, used excessive force and assaulted her. She failed to provide any affirmative evidence that the officers planted the drugs, except for her claim that neither she nor her son knew that the drugs were in the bedroom. To overcome summary judgment, the plaintiff must set forth specific facts showing that there is a genuine issue for trial. Her bare conclusion that because neither she nor her children knew anything about the drugs in the bedroom must mean that the officers left it there was insufficient to support her claim.

Similarly, her claim of destruction of property was also devoid of evidentiary support. She merely claimed that the home was in a state of devastation immediately after the police raid, but failed to provide any evidence regarding the pre-search condition of her home or any specific evidence that any property item was damaged. The officers did testify that they had to move some items around, but did not damage any property and in fact, it was so messy when they went in there that it was difficult to move around and search the home.

Plaintiff claimed that one of the officers struck her, causing injury. She was not able to identify any specific officer, but claimed it must have been Officer Moore who had the battering ram. All of the officers deny striking Heft, but one of them did say that they saw the door strike her in the upper body and face and that she fell backwards. There was no evidence to dispute

that Officer Moore was the third or fourth officer into the home. The Court upheld the directed verdict in favor of the defendants.

Hughes v. Lott, 350 F.3d 1157 (11th 2003)

Hughes alleges that he was forced to strip down to his underwear, sit in the cold for an extended period and then answer questions at the police station still wearing his underwear. Defendants argued that Section 1997(e) bars any claims seeking compensatory damages for emotional distress suffered while in custody under the Prison Litigation Reform Act. The Court noted that the Second, Third, Seventh, Ninth and Tenth Circuits have allowed prisoners to seek nominal damages if they can establish a violation of a fundamental constitutional right even if they cannot prove actual injury sufficient to entitle them to compensatory damages.

Failure to Protect

Rivas vs. City of Passaic, 365 F.3d 181 (3d Cir. 2004)

Two EMT's responded to a 911 call finding Mr. Rivas who they were told had been experiencing some convulsions and had had previous seizures. They were trained that a patient experiencing a seizure should not be disturbed during the seizure. The EMT's claimed that Mr. Rivas attacked one of them and after being pushed away he sat down on a closed toilet. The EMT's summoned the police. While removing Mr. Rivas from the bathroom, the officers claim he either became aggressive or had a seizure and fell on the floor. During a several minute struggle on the floor, Mr. Rivas lost control of his bladder. The three officers alleged that Mr. Rivas attempted to grab one of the officer's gun and two of the officers claim they were bitten by him.

Mrs. Rivas denies these allegations and claims that she yelled at the police "It's not like that – he's very sick," but that Officer Callaghan stood up and yelled, "Bitch, shut your mouth." After other police officers arrived, they were able to handcuff Rivas and the EMT's bound his ankles with cloth restraints. Rivas was placed face down on a stretcher (contrary to proper protocol to ensure airway remains clear) and carried down the stairs headfirst (also contrary to protocol). The family claims officers made remarks such as "Damn, he's heavy, this pig, this dog."

When one of the straps on the stretcher snapped, Rivas slid out of the stretcher head first tumbling down the stairs. He lay on the stairs losing control of his bowels, at which point two officers allegedly grabbed him by his arms and slid him down the remaining stairs. Officers claim he became combative and they held him down by placing body-weight on top of him. After being placed on an ambulance stretcher, paramedics noticed that Rivas was not breathing and had no pulse.

Claims against EMT's

The Court applied a four-part test adopted in Kneipp v. Tedder, 95 F.3d 1139 (3d Cir. 1996), to the state-created danger claims.

1. Was the harm to Mr. Rivas fairly foreseeable.

It is undisputed that Rivas was suffering from seizures and that the EMT's had been trained that he should not be restrained and his airway should remain open and unobstructed. Some evidence indicated that the EMT's informed the police that Rivas had assaulted one of them, but did not inform the officers of his medical condition. Therefore, a jury could find that the harm which befell Mr. Rivas was foreseeable and a fairly direct result of the actions of the EMT's.

2. Did the State actor act in willful disregard for the plaintiff's safety.

There was evidence in the record to suggest that Mr. Rivas did not attack the EMT and that they unnecessarily called for police assistance. If the EMT's misrepresented the attack to the police and failed to tell police that Rivas was suffering from a seizure and should not be restrained, then a jury could find that not only did they abdicate their duty to render medical assistance, but that they placed Mr. Rivas in greater danger by falsely accusing him of acting violently. Such conduct could be found to support the "shock the conscience" standard.

3. Was there some relationship between the State and the plaintiff.

Based on evidence that the EMT's responded to a 911 call for the purpose of providing medical care and reduce the danger to Mr. Rivas, they could find that he was among the "discreet class" of persons placed in harms way as a result of their actions.

4. Did the State actors use their authority to create an opportunity for danger that otherwise would not have existed.

Sufficient evidence existed to support allegations that the EMT's called for police back-up, erroneously reported the Rivas attack, failed to advise the officers about his condition, and abandoned control over the situation thereby creating an opportunity for harm that would not have otherwise existed.

The Court also found that the officers were not entitled to qualified immunity on the excessive force claims.

Tremblay vs. McClellan, 350 F.3d 195 (1st Cir. 2003)

After breaking up a party of underage drinkers and detaining so many that a school bus was needed to transport them, officers saw a couple of teen-agers walking on a road that they reasonably presumed had fled from the earlier party. These sixteen year old boys were taken to the police station where one was released to his parent but the other, claiming he did not know where his parents were, was taken home and left alone after the officer unsuccessfully attempted to get two of his friends' parents to allow him to come to their homes.

Tremblay was initially stopped at 2:00 a.m. walking along a major road and was driven home at 3:01 a.m. after the officer extracted a promise that he would stay at home until he heard from his parents. Instead, Tremblay took a family car without permission, picked up two friends and, at approximately 5:00 a.m., lost control of the vehicle crashing into a tree resulting in paralysis.

The Court found that the officer's actions were constitutional based on his **REASONABLE SUSPICION** to believe that the boys were in immediate danger walking on a highway at 2:00 in the morning in an apparently intoxicated condition (some state laws may set a higher standard than reasonable suspicion). Under the circumstances, a reasonable officer could have believed that he or she was authorized to take Trembley into protective custody and then to release him to his home.

Estate of Allen v. City of Rockford, 349 F.3d 1015 (7th Cir. 2003)

Plaintiff struck a tree with her car and was observed driving on the wrong side of the road prior to being stopped by an officer. After admitting to taking a drug called Soma (that was prescribed to her sister) and passing a Breathalyzer test, she was taken to the hospital for a urine sample. The doctor determined that there were nine fewer pills and was concerned that Allen may have overdosed on the Soma, which could have fatal consequences.

When Allen refused to consent to a drug screen, the doctor determined that blood and urine samples should be extracted. Officer Taylor informed the hospital that she would have no role in Allen's medical treatment. With the assistance of hospital staff, the doctor forcibly extracted the blood and urine samples. It was determined that Allen had taken other drugs in addition to the Soma and counteracting agents were administered to prevent drug overdose.

Allen contended that because she was subjected to forced medical treatment while a pre-trial detainee, the officers should be liable for due process violations under both the special relationship and state-created dangers theories.

Although the Court found that the officers did have a duty to assume responsibility for the safety and general well-being of the plaintiff, the evidence presented suggests that it was because the officers did not intervene with the medical treatment that they met their obligations to Allen. If the officers had intervened to prevent Allen's treatment, they would have left themselves open to charges of due process violations for failure to provide appropriate medical care to a pre-trial detainee.

The Court also recognized that the plaintiff had a liberty interest in preventing unwanted treatment. However, that principle is dependent on the individual's competency.

With regard to the state-created danger, the plaintiff contended that by taking her to the hospital and abandoning her to unwanted treatment, the police placed her in danger from an imminent battery, which they knew was about to occur. The Court rejected this theory finding that the officers attempted to minimize danger by allowing a licensed physician to exercise his judgment rather than substituting their own.

Di Benedetto v. Pan Am World Service, Inc., 359 F.3d 627 (2d Cir. 2004)

Plaintiff, a Port Authority police officer, responded to a report that there was an unclaimed bag emitting smoke on a Pan Am baggage carousel. Upon opening the bag, plumes of smoke emerged causing serious injury. The bag belonged to a Russian laser scientist and contained unlabeled and unreported chemicals. The Court rejected plaintiff's claim finding that no jury could have properly found that a reasonable airline would have x-rayed or hand-searched every checked bag on every one of its flights, as would have been necessary to find the chemicals in question. Nor could it be claimed that it was unreasonable for Pan Am to have failed to x-ray or search every bag before it was placed on Pan Am's baggage carousel.

Gatlin v. Green, 362 F.3d 1089 (8th Cir. 2004)

Gatlin, a long-time gang member, had a sentence reduced from twelve and one half years to three months probation in return for vital information about other gang related crimes including a murder. The murder suspect, while in prison, attempted to mail a transcript of Gatlin's police statement to another gang member along with a note, "Check this out. Something must be done about this." Upon being informed of the letter, Gatlin said that he already knew about it because the other gang member, (to whom the letter was sent), was a friend of his. At that time Gatlin reminded a sergeant that he feared for his safety and the safety of his family.

The following day, officers brought Gatlin to the police station and prosecutors arranged for the conditions of his probation to allow him to leave the state while his family was placed in the victim/witness protection program. The police department advanced him money to stay in a hotel and the witness protection program issued him money to pay for repairs to his vehicle and a U-Haul trailer, and agreed to pay additional funds to cover his first month's rent and security deposit in Arkansas. Less than a month later, Gatlin's body turned up in a Minneapolis alley where he had been shot between thirteen and fifteen times with a 40 caliber Smith & Wesson. At the time of his murder, none of the defendants knew that he was in Minneapolis.

The court found that there was no constitutional violation. Gatlin knew of the deadly risk inherent in cooperating with the police and all of the defendants' actions were undertaken with the purpose of minimizing the risk of a retaliatory gang hit against Gatlin by providing him with legal and financial means necessary to flee his would-be avengers. Mrs. Gatlin's contention that **more protective measures could have been taken** was unavailing.

The Court also rejected Gatlin's claims that officers received inadequate training in witness and informant protection and in jail communication, as no reasonable jury could decide a lack of training in these areas resulted in Gatlin's death.

International Action Center v. United States, 365 F.3d 20 (D.C. Cir. 2004)

Two organizations and several individuals brought suit against a number of entities arising from violations of their constitutional rights, which occurred at the 2001 Presidential inaugural parade. This appeal involved the denial of summary judgment of four District of

Columbia metropolitan police supervisors who were in charge of two undercover agents who allegedly, without justification, struck and sprayed a chemical agent into the eyes and faces at close range of some of the plaintiffs. Plaintiffs further claimed that other officers stood by and watched before eventually making a mock arrest of the two undercover officers before releasing them back into the crowd.

In essence, the plaintiffs were claiming that the four supervisors should be held liable for allegedly inadequately training and supervising the two undercover agents. The Court found that absent any claim that these supervisors were responsible for training, or were aware of any demonstrated deficiencies in that training, they could not be held liable simply because of the context of mass demonstration activity.

"A supervisor who merely fails to detect and prevent a subordinate's misconduct, therefore, cannot be liable for that misconduct. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." Therefore, absent an allegation that the supervisors had actual or constructive knowledge of past transgressions, or that they were responsible or aware of clearly deficient training, the supervisors could not be held liable for inaction or failure to supervise.

Supervisory

Dunn v. City of Elgin, 347 F.3d 641 (7th Cir. 2003)

Plaintiff and her husband were married in North Carolina. He abandoned her when she was pregnant with their child, failed to pay support resulting in her moving to Illinois to be closer to her parents. Prior to moving, the North Carolina court entered an order requiring the payment of child support, limited visitation and it retained jurisdiction over future custody determinations. While the plaintiff was living in Illinois, her husband was granted temporary exclusive care and custody of the child in North Carolina, which directed any law enforcement officer to serve and render assistance to aid in locating and delivering the child to the custody of the husband.

The husband brought this order to the Elgin Police Department. Sergeant McKinley, noting that there was no sign of the order being filed in Illinois, instructed the husband that the order could not be enforced and that the police would not physically remove the child but would only act in a peace-keeping capacity. She dispatched two officers to provide peacekeeping stand-by service for the child custody exchange. Despite these instructions, the officers went to the house and told the plaintiff that they were there to take the child pursuant to the North Carolina custody order. When the plaintiff told the officers they could not enforce an out-of-state order, they said that they were going to do it and took the child giving her to the husband. Plaintiff claimed that the City of Elgin was deliberately indifferent in failing to provide training regarding stand-by service.

They argued that because child custody disputes implicate protective constitutional rights, the City had a responsibility to instruct officers on how to proceed with custody orders. The Court granted summary judgment to the City because it did in fact adequately train its officers. First, the stand-by service required duties merely standing by to keep the peace, which

should not require extensive training. Second, the Department policy instructed officers that stand-by service required officers only to keep the peace and not take any other action. All officers were trained in this policy prior to the incident in question. The fact that two officers did not follow this policy was insufficient to prove deliberate indifference. Absent evidence that the city should have known that unless further training was given, officers would undermine the constitutional rights of citizens the City could not be held liable.

With regard to the officers, the Court found that they were not entitled to absolute immunity because the absence of any indication that the custody order had been filed in an Illinois Court was enough to render it facially invalid. The Court found that it was objectively unreasonable for the officers to believe that they had authority to physically seize the 15-month old child. Their supervisor had authorized them to conduct stand-by service, they knew they were acting pursuant to an out-of-state order, at least one of the officers suspected that the order was not enforceable and both knew that civil orders should not be enforced unless the supervisor approved such enforcement.

However, the officers were entitled to qualified immunity because plaintiffs were unable to show that the law was clearly established at the time of the incident that seizing the child pursuant to an out-of-state order could constitute a violation of the Fourth Amendment. Only one case was cited holding that ignoring statutory requirements that a custody order be signed by the Court from the proper jurisdiction violates the Fourth Amendment, however, that case was decided three months after this incident. Woley v. City of Baton Rouge, 211 F.3d 913 (5th Cir. 2000).

Graham v. County of Washtenaw, 358 F.3d 377 (6th Cir. 2004)

After being arrested for possession of marijuana, Graham was allowed to relieve himself behind a tree where he swallowed approximately an ounce of cocaine. Approximately 20 minutes later, while at booking, a deputy requested a medical examination based on Graham's erratic behavior. A licensed nurse employed by a private entity on contract with the Department interviewed and examined Graham. Graham told the nurse he had been drinking and using marijuana, and had asthma. Over the next hour, he exhibited more erratic behavior, sweated profusely and appeared to have a seizure, but continued to lie when asked whether he had ingested other drugs. Approximately one hour and fifteen minutes after first being examined, he passed out. He was transported to the hospital where he died.

Plaintiff claimed that the County's contract with SecureCare constituted municipal policy leading to the deprivation of Graham's constitutional rights to adequate medical care. They alleged that the contract creates a policy of "'automatic deference' by jail personnel to the decisions of SecureCare staff concerning medical treatment of prisoners" and that "the contract improperly permitted licensed practical nurses to perform duties that exceed their competence under state law."

The County conceded that the contract constituted a municipal policy within the meaning of Monell. The Court then concluded that the crux of plaintiff's argument was that the deputies deferred to the nurse who was unqualified to make certain decisions regarding Graham's

treatment as dictated by the policy. Essentially, Graham's argument was that the policy did not, in this particular case, adequately address plaintiff's medical needs. The Court found that even if Graham suffered a constitutional violation, it was not from a faulty policy. "Graham concedes that it is not unconstitutional for municipalities to hire independent medical professionals to provide on-site health care to prisoners in their jails.

Nor is it unconstitutional for municipalities and their employees 'to rely on medical judgments made by medical professionals responsible for prisoner care.'" Citation omitted. "In fact, most would find such a policy laudable in many respects. Not only does such a policy—like the one at issue in this case—allow prisoners to receive prompt health care from on-site doctors and nurses, it also ensures that an independent party, rather than a corrections officer, makes the critical decisions about whether and at what point a prisoner's medical needs are sufficiently severe that ambulatory care or hospitalization is warranted."

Isom v. Town of Warren, Rhode Island, 360 F.3d 7 (1st Cir. 2004)

Officers responded to a silent alarm learning from two hostages who escaped from a liquor store that a man was inside with an axe. Sergeant Green, the first officer to enter the store, drew his weapon and started talking to Isom . Two other officers entered, one positioning himself near Green and the other near the rear exit. They continuously pleaded with Isom to drop the axe, but he continued in a daze and did not reply. A captain and a detective then entered. The detective held up pepper spray to the captain, who nodded in an affirmative way. The detective yelled "ASR", an indication that he was going to use pepper spray. The pepper spray appeared to have no effect on Isom who suddenly lifted the axe and charged toward Green resulting in two officers firing their weapons, killing Isom.

Green testified that as the primary officer his responsibility was to prevent the situation from escalating, he therefore would not have used pepper spray, however, the detective who entered after some control had been gained over the situation was in a different situation and it was reasonable for him to use pepper spray in an attempt to diffuse the situation.

The Court found that the use of deadly force was constitutionally permissible as the officers were faced with a suicidal man, who had briefly held two hostages and was refusing to comply with their continuous requests to put down the axe. Without some evidence bringing into question the officer's judgment to use pepper spray, the plaintiff could not prevail at trial. (Plaintiff was precluded from presenting evidence provided by his experts because he failed to provide expert disclosure statements. Defendant's summary judgment motion was not decided prior to trial.)

The Court also found that the use of chemical spray was reasonable under the State statute.

Chemical substances may be used when physical force is necessary:

a. to protect an officer or other person from an assault; or
b. to SUBDUE a person who resists arrest; or
c. to deter persons engaged in riotous conduct.

It is preferred that chemical substances not be used if resistance is minor and not hazardous, or if physical powers would reasonably achieve the same end.

Campbell v. Miller, 373 F.3d 834 (7th Cir. 2004)

This case discusses an attempt to obtain injunctive relief regarding body cavity searches. The Marion County lockup, per County order, would no longer accept custody of persons who committed misdemeanors involving possession of marijuana or paraphernalia, driving with a suspended license or never having received a license, and prostitution or patronizing a prostitute and conversion. The Indianapolis Police Department body cavity search policy authorized officers to conduct thorough body searches of persons charged with nonviolent misdemeanors. The only guidance given to officers was that the search should be conducted "if the officer feels it is necessary." In the case in issue, the plaintiff was arrested for misdemeanor marijuana charges and was subjected to a body cavity search in an open backyard within the view of others. Although the majority determined that injunctive relief was not available to this plaintiff, the dissenting opinion spoke to the constitutionality of the policy:

> That the search of Campbell was conducted in public significantly increases the severity of the governmental intrusion involved here. The defendants' professed reasons for the policy in all likelihood cannot justify such extreme incursions in a person's privacy under the Fourth Amendment. That the policy confers unbridled discretion on the officers and does not even require reasonable suspicion for an officer to conduct a strip and body cavity search…makes the likelihood of the IPD policy's unconstitutionality only greater. The Constitution clearly requires at least reasonable suspicion for a law enforcement officer to subject a person to such a search.

Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004)

Plaintiffs allege they were victims of excessive force perpetrated by the Town's police officers at two peaceful anti-abortion protests. The first occurred on April 1, 1989, when dozens of protesters remained in the reception area and others chained themselves together to block entry to the clinic. The dozens of demonstrators employed passive resistance to impede their arrests after being asked to leave the area, including going limp, refusing to identify themselves and refusing to unlock the chains. The plaintiffs allege the police used more force than necessary and inflicted severe pain by dragging them out by their elbows, using choke holds and lifting them from the floor by their wrists.

One claimed an officer shoved his head to the floor and threatened those who were praying aloud that they would get more if they kept crying out in praise of the Lord. Sixty-one protesters were arrested. It was undisputed that the Police Chief was present and supervised officers handling the situation. The Town asserted that the Chief witnessed no brutality and that the officers only used pain compliance techniques specifically designed and intended to allow officers to use minimum necessary force. One protester's son alleged that he attempted to complain to the Chief who said he was not taking complaints.

A second demonstration occurred on June 17, 1999. It is alleged that the Chief not only was present, but participated in the brutality. One demonstrator claimed the Chief observed an officer put a knee into a demonstrator's back, after which the Chief himself grabbed the demonstrator's hair and jerked his head back. One claimed that an officer kicked her in the back, forcing her face to the pavement telling her that the Chief didn't want to speak to her. Another claimed the Chief watched as one by one the protesters were brought in to be cuffed and dragged out to waiting busses. Plaintiffs claim that the chief failed to supervise and train his officers. Before addressing these claims, the Court found that a reasonable jury could find that the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances and that the determination as to the objective reasonableness of the force must be made by a jury following a trial. Summarizing various avenues to municipal liability including:

- An unconstitutional policy ordinance;

- The adoption of a particular course of action which represents an act of official government policy;

- A city's official policy is constitutional but the city causes its employees to apply it unconstitutionally such as where the city is aware that its policy may be unconstitutionally applied by any adequately trained employees but consciously chooses not to train them or where the city's official policy on the reasonable use of force in arrests is valid, but the city's actual practice is to use excessive force;

- A single action by a decision maker who possesses final authority to establish municipal policy with respect to the action ordered is sufficient to implicate the municipality in the constitutional deprivation;

- The authorized policy makers approve the subordinate's decision and the basis for it;

- Or, where the plaintiffs attribute the subordinate's conduct to actions or omissions of a policy maker is established by showing that the policy maker ordered arrests by the subordinate's actions.

In this case, the Court found that the plaintiffs provided sufficient factual basis to support a claim that the Chief witnessed the brutality but failed to supervise the officers in a way that would have prevented the violation of plaintiffs' constitutional rights. The Court found that the plaintiffs' affidavits were sufficient to withstand summary judgment because the evidence allowed an inference that the Chief witnessed and perhaps encouraged unconstitutional conduct, thus supporting a claim of deliberate indifference to the demonstrators' rights.

With regard to the failure to train theory, the plaintiffs' sole evidence was that the police used excessive force on two successive occasions. The plaintiffs failed to offer any evidence as to the purported inadequacy of the Town's training program and the causal relationship between those inadequacies and the alleged constitutional violations. Canton requires the plaintiffs to

establish that the failure to train occurred under circumstances that constitute deliberate indifference and they must identify a specific deficiency in the training program and establish that that deficiency is closely related to the ultimate injury such that it actually caused the constitutional deprivation.

At trial the jury found the Chief not liable.

Larkin v. St. Louis Housing Authority Development Corp., 355 F3d 1114 (8th Cir. 2004)

Johnson, a security guard at the Housing Authority, responded to a fight in progress. He testified that during a struggle over his gun he shot Larkin. Other witnesses stated that Larkin was merely involved in play boxing and that he was shot simply because he did not follow Johnson's directions. Johnson had been licensed by the St. Louis City or County police departments for six years prior to the incident. He received his license after three days of training, which included both classroom and firearms training and testing. He also received Missouri regulations governing the use of deadly force by security guards.

In regard to the failure to train claim, the Court focused on the adequacy of the training program in relation to the tasks the particular officers performed. Although plaintiff's expert testified that the training was less than other major municipality armed security guards, he did not testify that the conditions in those cities were comparable to those at Cochran Gardens, nor did he testify that the additional training in the noted municipalities was necessary in relation to their duties.

The Court concluded that a reasonable juror could not find that the Authority's reliance on the training provided for licensure was inadequate given the lack of evidence that its officers were required to perform unusually challenging duties under unusually challenging conditions. Although it may have been reasonable for the Housing Authority to rely on the adequacy of the training provided for licensing, such training will not necessarily protect the entity from liability when there is evidence that additional training is necessary given the officer's duty.

Kelso v. City of Toledo, 77 Fed.Appx. 826 (6th Cir. 2003)

Plaintiffs claim that the police department covered up evidence of an off-duty officer's intoxication that resulted in injuries they suffered when the officer's mini-van crossed the center line striking their vehicle. The claim against the police chief failed because he became chief 73 days after the accident and there were no facts linking him to an ongoing effort to conceal evidence. The claims against the City failed because the department had a policy against concealment of evidence and the policy manual contained directions to its officers not to cover up evidence of misdoings by officers.

The Court did note that the Constitution protects the citizen's right of access to the courts and that right extends to protection against police conspiracies to conceal evidence. "When a state official acts to cover up evidence of governmental misconduct and when these actions prevent a plaintiff from having 'effective' or 'meaningful' state court remedy, the official thus violates the plaintiff's constitutional rights of access to courts."

The Court concluded that all of the evidence amounted to a claim that if the department had done a better job, more evidence that the officer was intoxicated would have been available to the plaintiffs, however, laxity in investigation, without active concealment, does not amount to a violation of constitutional rights.

Floren v. Whittington, 217 F.R.D. 389 (S.D. West Virginia 2003)

Plaintiff alleges that he was arrested when he ordered a police officer to leave his property, who was on the property without permission for no official purpose. He claims that the department inadequately trained, supervised and disciplined its police officers regarding unlawful retaliation against citizens for simply exercising their constitutional rights. The plaintiff requested disclosure of citizen complaints, internal investigations and their results as potentially relevant to these issues.

The Court explained that there is an overriding policy of disclosure of relevant information in the interests of promoting the search for truth in a federal question case. State law on disclosure is not dispositive, but should be considered in a federal case. There is a general presumption against invocation of an official information privilege.

The City contended that discovery of internal affairs and personnel files would: (1) disseminate highly private information, (2) threaten the safety of officers and their families and (3) harm investigative and (4) citizen complaint candor.

Ultimately the Court found that these risks could be avoided through the use of in-camera inspection and carefully crafted protective orders. Citing prior case law, the Court recognized that if the trial court determines that the requesting party's need for the material outweighs the public interest in retaining confidentiality, the court should consider whether any adverse effects to the public interest can be eliminated or reduced through the use of an appropriately drawn protective order constricting the manner in which such information is disseminated and the parties to whom it is provided. Where appropriate, the use of protective orders is preferential to the total nondisclosure of requested materials that are otherwise subject to discovery.

© 2004 by the Connecticut Criminal Law Foundation, Inc.